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State of Utah v. Mark Caldwell : Brief of Appellant

Utah Court of Appeals

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J. Franklin Allred; Attorney for Appellee.

DOCKET NO. 900066 CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellant,	:	Case No. 900066-CA
v.	:	
MARK CALDWELL,	:	Category No. 2
Defendant-Appellee.	:	

BRIEF OF APPELLANT

APPEAL FROM A DISMISSAL OF THE CHARGE OF ARRANGING TO DISTRIBUTE A CONTROLLED SUBSTANCE, A SECOND DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE MICHAEL R. MURPHY, JUDGE, PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONS, STATUTES AND RULES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellant,	:	Case No. 900066-CA
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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a dismissal of the charge of arranging to distribute a controlled substance, a second degree felony, under Utah Code Ann. § 58-37-8(1)(a)(ii) (1990).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989) and rule 26(3)(a), Utah Rules of Criminal Procedure.

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARD OF APPELLATE REVIEW

The sole issue presented on appeal is whether the trial court erroneously dismissed the charge against defendant on the ground that a potential purchaser could not, as a matter of law, be guilty of arranging to distribute a controlled substance under Utah Code Ann. § 58-37-8(1)(a)(ii) (1990).

Because the trial court's ruling is strictly a legal conclusion, this Court affords it no deference on appeal and applies a "correction of error" standard. Provo City Corporation v. Willden, 768 P.2d 455, 456 (Utah 1989); State v. Wessendorf,

777 P.2d 523, 526 (Utah Ct. App.), cert. denied, 781 P.2d 878 (Utah 1989); State v. Johnson, 771 P.2d 326, 327 (Utah Ct. App.), cert. granted, ___ P.2d ___ (Utah 1989).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Relevant text of statutory provisions pertinent to the resolution of the issue presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant, Mark Caldwell, was charged with arranging to distribute a controlled substance, a second degree felony, under Utah Code Ann. § 58-37-8(1)(a)(ii) (1990) (R. 7).

After the State had presented its evidence at trial, defendant moved to dismiss the charge against him. The court granted defendant's motion and entered a judgment of dismissal (R. 56-58; Partial Statement of the Case (hereafter "Statement") at 3).[1] Thereafter, the State filed a motion to set aside the judgment of dismissal, which the court denied (R. 62-69, 146-48). The State now appeals.

STATEMENT OF FACTS

There is no dispute as to the facts. On April 20, 1989, several undercover police officers were at a residence in

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[1] Pursuant to rule 11(f), Utah Rules of Appellate Procedure, the parties have prepared and submitted to the trial court a partial statement of the case for purposes of this appeal. That statement, which covers the undisputed facts developed at trial and the court's ruling from the bench, should be a part of the record on appeal at the time this case is submitted to the Court for decision.

The trial court's ruling from the bench also appears in a transcript included as an appendix to the State's motion to set aside the judgment of dismissal (see R. 72-86).

Salt Lake County executing a search warrant. At approximately 5:50 in the evening, defendant and a female arrived at the residence and knocked on the door. When one of the officers opened the door and asked what they wanted, defendant responded that he wanted "a half ounce," a request the officer, based on his experience with drug transactions, understood to be one for a half ounce of cocaine. It soon became apparent that defendant in fact desired to purchase cocaine (Statement at 1-2).

The officer asked defendant if he had the money, and defendant gave him a check which appeared to be a tax refund check in the amount of $750 and some change. The officer told defendant that he could not use the check, to which defendant responded that he would go and cash it. When the officer asked defendant if he was sure of what he wanted, defendant said, "Yeah, a half ounce of cocaine." At that point the officer identified himself as a police officer, arrested defendant, and seized the check (Statement at 2).

SUMMARY OF ARGUMENT

In the instant case, defendant attempted to purchase cocaine. Under State v. Ontiveros, 674 P.2d 103 (Utah 1983), and State v. Renfro, 735 P.2d 43 (Utah 1987), he, as a potential purchaser who engaged in the conduct that he did, can be criminally liable under the "arranging" provision contained in Utah Code Ann. § 58-37-8(1)(a)(ii) (1990). That provision, as construed in Ontiveros and Renfro, logically applies to both potential sellers and potential buyers. The trial court erroneously concluded otherwise.

ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT A POTENTIAL PURCHASER OF A CONTROLLED SUBSTANCE CANNOT BE CRIMINALLY LIABLE UNDER THE "ARRANGING" PROVISION CONTAINED IN UTAH CODE ANN. § 58-37-8(1)(a)(ii) (1990).

The trial court dismissed the charge against defendant on the ground that "[n]one of the sections [of the pertinent Utah statutes] interdict and prohibit the purchase or attempted purchase of drugs if there is no accompanying possession of a drug by the purchaser or attempted purchaser." Statement at 3. This conclusion failed to take into account several key cases decided by the Utah Supreme Court, which were cited to the court by the State in its motion to set aside the judgment (R. 64-69).

Defendant's attempted purchase of a controlled substance clearly violates the "arranging" provision of section 58-37-8(1)(a)(ii), under which he was charged. That section provides in pertinent part that it is unlawful for a person to knowingly and intentionally "agree, consent, offer, or arrange to distribute a controlled or counterfeit substance." In State v. Harrison, 601 P.2d 922 (Utah 1979), the Utah Supreme Court, interpreting the "arranging" provision as it appeared under a prior codification (section 58-37-8(1)(a)(iv)), stated:

> [A]ny witting or intentional lending of aid in the distribution of drugs, whatever form it takes, is proscribed by the act.

601 P.2d at 923 (emphasis added). That one who attempts to purchase a controlled substance can be guilty of arranging is supported by State v. Ontiveros, 674 P.2d 103 (Utah 1983)

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff-Appellant, vs. MARK CALDWELL, Defendant-Appellee.	NOTICE OF NON-RESPONSE OF APPELLEE Case No. 900066-CA Category No. 2

The Appellee above-named by and through his Attorney J. Franklin Allred, hereby gives Notice to the Appellant that there was no response to the Brief on the grounds and for the reasons that a prior agreement between Appellee and Appellant makes the issues raised by the Appellant moot as to the Appellee and the Appellee elects not to extend the time and the expense to file a Responsive Brief.

DATED this 3rd day of July, 1990.

J. FRANKLIN ALLRED
Attorney for Appellee

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Notice Of Non-Response of Appellee was mailed postage prepaid to David B. Thompson, Assistant Attorney General, 236 State Captiol, Salt Lake City, Utah 84114.

DATED this 3rd day of July, 1990.

J. FRANKLIN ALLRED

(construing former section 58-37-8(1)(a)(iv)). There, the defendant, upon the request of an undercover officer to purchase some marijuana, accompanied the officer to a residence where defendant took the officer's $40, went into the residence, returned shortly thereafter, and delivered a bag of marijuana to the officer. In reversing the defendant's conviction of distributing a controlled substance for value and concluding that this was instead "a classic case of arranging to distribute a controlled substance for value," the Court observed that "[t]he evidence only shows that the [defendant] acted as the officer's agent in making the purchase from a third party." 674 P.2d at 104 (emphasis in original). Obviously, if a purchaser's agent can be guilty of arranging under these circumstances, the purchaser (the principal) also can be guilty of arranging. See Utah Code Ann. § 76-2-202 (1990).

To convict one (including a purchaser) of arranging, the state need not prove a completed transaction. As stated in Harrison:

> Inasmuch as an actual sale took place in this case, it is unnecessary to address the point, but it is noteworthy that the offense of arranging the distribution for value of a controlled substance does not require the actual distribution. All that is needed is the arrangement for such distribution, coupled with knowledge or intent. Evidence of an actual sale may be helpful, or even necessary, in proving knowledge or intent, but sale itself is not an element of the offense.

601 P.2d at 924 n.5. And, the conduct engaged in by defendant in the instant case plainly constitutes the crime of arranging. In State v. Renfro, 735 P.2d 43, 44 (Utah 1987), the Court held that

the defendant, a seller, could be found guilty of arranging where he "discussed the purchase [of marijuana] with officers, set a price for the marijuana, and agreed to make the exchange." Defendant's conduct was nearly identical, the only difference being that he was on the other end of the transaction.

When read together, Ontiveros and Renfro support the conclusion that a potential purchaser, who engages in conduct like that engaged in by defendant, is guilty of arranging under section 58-37-8(1)(a)(ii). The trial court's view that that section is directed at sellers only, see Statement at 2-3, ignores Ontiveros, where the defendant was specifically identified as the purchaser's agent. Indeed, there is no logical reason to distinguish sellers from buyers for purposes of the crime of arranging; the distribution of a controlled substance may be as much arranged by the buyer as by the seller. It is difficult to argue that the middleman in a "classic case of arranging" who merely brings the buyer and seller together, as was the case in Ontiveros and Harrison, is more culpable than the potential purchaser who arranges the transaction himself or herself.

In sum, the trial court failed to consider adequately the facts and holdings of Ontiveros and Renfro in dismissing the charge against defendant. Those cases support an arranging charge, even though defendant was a potential purchaser.

CONCLUSION

Based on the foregoing argument, this Court should reverse the trial court's judgment of dismissal.

RESPECTFULLY submitted this 16th day of May, 1990.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellant were mailed, postage prepaid, to J. Franklin Allred, Attorney for Appellee, 321 South 600 East, Salt Lake City, Utah 84102, this 16th day of May, 1990.

David B. Thompson